

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CREAMUS PAXTON HOWARD,

Defendant-Appellant.

UNPUBLISHED

March 31, 2000

No. 218781

Wayne Circuit Court

Criminal Division

LC No. 96-007291

Before: Wilder, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his plea-based conviction of criminal sexual conduct in the second degree (CSC II), MCL 750.520c; MSA 28.788(3). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was arrested and charged in the instant case on May 3, 1996. He was unable to post bond. While he was in custody, defendant was charged with CSC II in a second case. Defendant was convicted in that case, and on June 6, 1997 was sentenced to ten to fifteen years in prison. Prior to sentencing in the second case, defendant moved to dismiss the instant case on the ground that the prosecutor had not brought him to trial within 180 days. MCL 780.131; MSA 28.969(1); MCR 6.004(D). The trial court denied the motion. On May 4, 1998 defendant pleaded nolo contendere to one count of CSC II in the instant case, in return for dismissal of a charge of criminal sexual conduct in the first degree, MCL 750.520b; MSA 28.788(2). In addition, the parties agreed that defendant would be sentenced to ten to fifteen years in prison, with the sentence running concurrently with the previous sentence. The 180-day rule issue was not preserved by defendant's plea. The trial court accepted the plea, and on May 19, 1998 sentenced defendant to ten to fifteen years in prison, with credit for 288 days. The credit represented the time defendant spent in custody between the date of arrest in the instant case and the date of sentencing in the second case. The trial court denied defendant's subsequent motion to withdraw his plea.

Initially, defendant argues that the trial court lost jurisdiction because the prosecutor failed to bring him to trial within 180 days. We disagree. An unconditional plea of nolo contendere waives

review of a claim that the 180-day rule was violated. *People v Irwin*, 192 Mich App 216, 218; 480 NW2d 611 (1991).

In addition, defendant argues that he was entitled to withdraw his plea because it was not knowingly and voluntarily made with knowledge of the consequences, i.e., that the plea waived his claim that the 180-day rule was violated. We disagree. We review a trial court's decision on a motion to withdraw a plea made after sentencing for an abuse of discretion resulting in a miscarriage of justice. *People v Ovalle*, 222 Mich App 463, 465; 564 NW2d 147 (1997). In the instant case, defendant's assertion that when he entered his plea he understood that he was preserving the 180-day rule issue for appeal is completely unsubstantiated. During the course of the plea hearing, defendant stated that there were no agreements other than those that had been placed on the record. Preservation of an issue for appeal was not discussed during the hearing. The trial court's denial of defendant's motion to withdraw his plea did not result in a miscarriage of justice.

Finally, defendant argues that the trial court's decision to grant him credit for time served only from the date of his arrest in the instant case to the date of sentencing in the second case, a total of 288 days, instead of granting credit for all time served from arrest to sentencing in the instant case, a total of 621 days, resulted in the imposition of a sentence of ten years, 333 days to fifteen years. Defendant asserts that this sentence violated the two-thirds rule. *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). We disagree. During the period from June 6, 1997 to May 19, 1998, defendant was serving a prison term imposed in the second case. He was not incarcerated due to an inability to post bond in the instant case. Therefore, he was not entitled to credit for that period in this case. MCL 769.11b; MSA 28.1083(2); *People v Givans*, 227 Mich App 113, 124-126; 575 NW2d 84 (1997). Defendant's sentence in this case does not violate *Tanner*, *supra*.

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Jane E. Markey